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IN THE

Supreme Court of the United States

October Term, 1963
No. 141

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Reply of Petitioner Paul John Carbo to Brief for the United States in Opposition.

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1. The very distinction sought to be drawn by respondent as to the co-conspirator declaration question, demonstrates the necessity for the grant of certiorari (Reply to Respondent's Point 1, pp. 12-18).

Respondent's concession (p. 14) that the instruction requested by petitioner, but not given as to him, "is customarily given in conspiracy cases, whatever the nature of the conspiracy charged," (Citing *Glasser v. United States,* 315 U. S. 60, 74) and the distinction it seeks to make (p. 15) between the conspiracies charged in this case and other conspiracies, are, we submit, ample reason for certiorari to be granted. Respondent agrees with petitioner (Petition, p. 9) that the failure to instruct as requested is contrary to the rationale of this Court's decision in *Glasser* and that the point has not been decided. That the question involved is important, cannot be gainsaid.

Petitioner does not agree that the distinction respondent seeks to draw is a valid one, nor that hearsay suddenly, somehow, ceases to be hearsay. But those are questions which should be decided by this Court after briefing and argument; they should not be left in limbo by the summary denial of certiorari.

2. The induction coil issue in this case warrants the grant of certiorari (Reply to Respondent's Point 2, pp. 18-20).

In *Rathbun v. United States*, 355 U. S. 107, the Government made a definite distinction between a conversation overheard on a regularly installed telephone and one overheard by means of an instrument specially installed to hear a particular conversation (See Petition in the instant case, pp. 17-19). That argument apparently persuaded this Court to decide *Rathbun* as it did (355 U. S. at 107 and 111). The distinction drawn by the Government in *Rathbun* is one which was clear to Mr. Justice Brennan and the other Justices concurring with him, dissenting in *Lopez v. United States*, 373 U. S. 427, 453.

But here the Government says (Br. in Opp. 18, 19), "there is, in our view, no significant difference between this case and *Rathbun v. United States*, 355 U. S. 107 . . . there (is no) reason why . . . the mechanical method by which the authorized disclosure is made, should affect the basic rule." We submit that the Government should not be permitted to cut the cloth to fit the needs for winning a case (*cf. Berger v. United States*, 295 U. S. 78, 88). Important constitutional rights should not thus be watered down to suit the Government's convenience at the time (*Cf. Jones v. United States*, 362 U. S. 257, 263: "to hold

to the contrary . . . would be to permit the Government to have the advantage of contradictory positions as a basis for conviction." See also, *United States v. Atlantic Refining Co.*, 360 U. S. 19, 23-24).

In any event, the distinction made by the Government in *Rathbun* is presented in the case at bar. Certiorari should be granted to determine whether it is a valid one.

Respondent seeks (Br. 19) to differentiate the present case from *Ferguson v. United States*, certiorari granted, No. 198, this Term, on the basis that induction coil listening under Oklahoma state law is illegal. We fail to see what difference it could make to this Court in adjudicating the admissibility of evidence in the federal courts, whether the state considers the conduct to be a violation of its law. But if that distinction made by respondent is sufficiently critical "to turn the color of legal litmus paper" (Mr. Justice Holmes, dissenting, in *Abrams v. United States*, 250 U. S. 616, 629), it is another reason for certiorari's being granted. If the distinction be a good one, a proposition with which petitioner does not agree, the decision that this is so should be made after briefing and argument and not by denial of a hearing.

3. The surreptitious use of the electronic wire recorder and radio transmitter warrants a hearing by this Court (Reply to Respondent's Point 3, pp. 20-21).

Respondent is incorrect, we submit, in its assertion (Br. 20) that "on that issue this case is governed by *Lopez v. United States*." (373 U. S. 427). As pointed out in our Supplement to Petition for Writ of Certiorari (pp. 8-14), that case augurs for the grant of certiorari, not for denial.

As to *Massiah v. United States,* certiorari granted, No. 199 this Term, it is true that there is a distinction between that case and this one in that the surreptitious electronic overhearing there was after the defendant had been charged and had retained an attorney. But the distinction is not one which has been the basis of decision by this Court, though it does seem to be of concern to the Chief Justice (*cf. Lopez v. United States,* 373 U. S. 427, 444, f.n. 1). As to whether the distinction is decisive, is, therefore, an open question which should continue to be open until the instant case has been briefed and argued.

Whether the electronic eavesdropping occurs prior or subsequent to the institution of a prosecution should make no essential difference; the inroad into privacy is as bad whether before or after. Indeed, it could cogently be argued that after a prosecution begins, the individual is more likely to be on his guard and, hence, more discreet. In any event, the supposed distinction, rather than suggesting the denial of certiorari, suggests the propriety of a hearing by this Court.

4. The "underworld reputations" charges in the indictment and the evidence concerning those charges admitted at the trial, require the granting of certiorari (Reply to Respondent's Point 4, pp. 22-23)

Respondent does not dispute petitioner's assertions (Pet. 26) that the question has never been decided by this Court[1] nor that the issue is an important one. Whether an indictment so drawn should be permitted to stand and whether evidence concerning a defendant's

[1]Nor any other court. *Callanan v. United States,* 223 F. 2d 171 (CA 8 1955), cert. den. 350 U. S. 862, cited by respondent (Br. 23), was not a reputation case.

reputation should be allowed as a part of the prosecution's case in chief,[2] particularly as used against this petitioner with no evidence that he even knew of the alleged reputations of Sica and Dragna, are matters which should be decided by this court on review, not by denial of certiorari.

5. Respondent's Points 6 (Br. 23-27) and 7 (Br. 27-29) are answered in the Petition (pp. 27-33) where the unfairness of the trial afforded this petitioner is demonstrated and wherein is shown, we submit, the necessity for the exercise of this Court's power of supervision.

6. The Rule 25 Point in the case merit this Court's review (Reply to Respondent's Point 8, pp. 29-30).

Here, again, respondent does not take issue with petitioner's assertions (Pet. 13) that the question presented has not been passed upon by this Court and that the matter is of obvious and recurring importance. Respondent's argument is that (Br. 30), "it is the function of the jury, rather than the trial judge, to weigh the evidence, and particularly to judge the credibility of witnesses." But this does not meet the point involved, nor offer a reason as to why this Court should not hear the case.

The statement by respondent fails to give effect to the duty of the judge in passing upon a motion for new trial. At that stage of the proceedings the judge exercises a function quite different from that which he exercises when considering a motion for acquittal prior to the submission of the case to the jury. In ruling on

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[2]Respondent has ignored petitioner's argument (Pet. 24-26) based on the vagueness of the word "underworld".

a motion for new trial he is not "taking the issue of credibility from the jury"; (Resp. Br. 30) the jury has already fulfilled its function. "[A] defendant is entitled to two decisions on the evidence, the second by the trial judge in his consideration of a motion for a new trial. . . . On such a motion it is the trial court's duty to review the evidence and to determine whether in its judgment the weight of the evidence supports the jury's verdict. . . . In performing that duty the trial court must '". . . judge the credibility of the witnesses, determine the probative force of testimony, and weigh the evidence. . . .'". . . ." (*People v. Ketchell,* 59 A.C. 524, 566, 30 Cal. Rptr. 538, 561-562, 381 P. 2d 394, 417-418). "Under these fundamental and elementary principles, invariably governing the administration of criminal law in our courts, the accused, . . . (i)n effect . . . has a trial by the judge in addition to the trial by the jury." (*Rees v. United States,* 95 F. 2d 784, 790-791 [CCA 4 1938]). That additional trial was denied petitioner here. Certainly, the issue warrants review.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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